

Elnorris Stone
#V67067
Folsom State Prison
P.O.Box 950
Folsom, CA. 95763

FILED

AUG 1 2008

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

C
Elnorris Stone,)
Petitioner,)
v.)
M.C. Kramer, Warden,)
Respondent.)

)

CASE No. : CV 07 6263 TEH (PR)
Notice of Motion & Motion for
Directed NUNC PRO TUNC

TO: THE HONORABLE COURT IN THE ABOVE ENTITLED ACTION PLEASE
TAKE NOTICE: That as soon as this matter may be heard by the court, the above named Petitioner will move for a Directed NUNC PRO TUNC in the above entitled action.

Petitioner is asking that if it proves necessary let the 'new' Petition relate back to the original filing date of Dec. 6 2007, as the original Petition was dismissed without prejudice.

The Petition was mailed to the District Court on Dec. 6, 2007 & filed 12/11/2007. Order dismissing case pending resolution & exhaustion in State Court was filed 4/28/08. I received the Order on 5/19/08 due to a transfer and change in Prison location. Exhaustion in State Court is now complete (see enclosed denial from California State Supreme Court).

Due to the above facts, Petitioner respectfully requests that the Dockett sheet in this case be corrected NUN PRO TUNCT to Dec. 6, 2007, the date the original Petition was filed.

DATE: 7/27/08

Respectfully submitted



petitioner

S160487 1

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re ELNORRIS STONE on Habeas Corpus

The petition for writ of habeas corpus is denied.

**SUPREME COURT
FILED**

JUL 16 2008

Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice

IN THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF
CALIFORNIA.

ORDER

The above-entitled matter, having come before this Court on
Date: 2008 upon the Petitioners, Elnorris Stone's
Motion for Directed NUNC PRO TUNC, and the Court being duly advised,
it is ORDERD AND ADJUDGED that the Petitioners Motion is Hereby
granted, and the Dockett Sheet in this case be corrected NUN PRO
TUNCT to Dec. 6, 2007, the date the original Petition was filed.

DONE AND ORDERD in The United States District Court, Northern
District Of California this day , 2008.

DATED:

Thelton E. Henderson
United States District Judge

11

INMATE REQUEST FOR INTERVIEW

DEPARTMENT OF CORRECTIONS

STATE OF CALIFORNIA
GA-22 (9/92)

DATE 7/28/08	TO Trust Accounting Office	FROM (LAST NAME) Stone, E.	CDC NUMBER V67067
HOUSING B1-C1	BED NUMBER 31U	WORK ASSIGNMENT Bridging Arts in Correction	JOB NUMBER BRG-A-001 FROM 0700 - TO 430
OTHER ASSIGNMENT (SCHOOL, THERAPY, ETC.)		N/A	ASSIGNMENT HOURS FROM - TO -

Clearly state your reason for requesting this interview.

You will be called in for interview in the near future if the matter cannot be handled by correspondence.

I need a Certified Copy of my trust account for the last 6 months and the enclosed document filled out and returned for mailing to the U.S. District Court as soon as possible, thank you for your time and attention. God bless You.

INTERVIEWED BY	Do NOT write below this line. If more space is required, write on back.	DATE
DISPOSITION		

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

16 I, Elnorris Stone, declare, under penalty of perjury that I am the plaintiff in
17 the above entitled case and that the information I offer throughout this application is true and correct.
18 I offer this application in support of my request to proceed without being required to prepay the full
19 amount of fees, costs or give security. I state that because of my poverty I am unable to pay the
20 costs of this action or give security, and that I believe that I am entitled to relief.

21 In support of this application, I provide the following information:

22 1. Are you presently employed? Yes No X

23 If your answer is "yes," state both your gross and net salary or wages per month, and give the name
24 and address of your employer:

25 Gross: N/A Net: N/A

26 Employer: **N/A**

27

28 If the answer is "no," state the date of last employment and the amount of the gross and net salary.

1 and wages per month which you received. (If you are imprisoned, specify the last place of
 2 employment prior to imprisonment.)

3 Date of last employment 2001, net wages per month -\$1,000

4 Last place of Employment - I.B.E.W. (International Brotherhood
 5 of Electrical Workers).

6 2. Have you received, within the past twelve (12) months, any money from any of the following
 7 sources:

8 a. Business, Profession or Yes No X
 9 self employment

10 b. Income from stocks, bonds, Yes No X
 11 or royalties?

12 c. Rent payments? Yes No X

13 d. Pensions, annuities, or Yes No X
 14 life insurance payments?

15 e. Federal or State welfare payments, Yes No X
 16 Social Security or other govern-
 17 ment source?

18 If the answer is "yes" to any of the above, describe each source of money and state the amount
 19 received from each.

20 _____

21 _____

22 3. Are you married? Yes No X

23 Spouse's Full Name: N/A

24 Spouse's Place of Employment: N/A

25 Spouse's Monthly Salary, Wages or Income:

26 Gross \$ N/A Net \$ N/A

27 4. a. List amount you contribute to your spouse's support: \$ N/A

28 b. List the persons other than your spouse who are dependent upon you for support

1 and indicate how much you contribute toward their support. (NOTE: For minor
 2 children, list only their initials and ages. DO NOT INCLUDE THEIR NAMES.).

3 N/A

4
 5. Do you own or are you buying a home? Yes No X

6 Estimated Market Value: \$ / Amount of Mortgage: \$ /

7 6. Do you own an automobile? Yes No X

8 Make / Year / Model /

9 Is it financed? Yes / No / If so, Total due: \$ /

10 Monthly Payment: \$ /

11 7. Do you have a bank account? Yes / No X (Do not include account numbers.)

12 Name(s) and address(es) of bank: _____

13 _____

14 Present balance(s): \$ N/A

15 Do you own any cash? Yes / No / Amount: \$ /

16 Do you have any other assets? (If "yes," provide a description of each asset and its estimated
 17 market value.) Yes No X

18 _____

19 8. What are your monthly expenses?

20 Rent: \$ N/A Utilities: N/A

21 Food: \$ N/A Clothing: N/A

22 Charge Accounts:

Name of Account	Monthly Payment	Total Owed on This Acct.
-----------------	-----------------	--------------------------

<u> / </u>	\$ <u> / </u>	\$ <u> / </u>
----------------------	-------------------------	-------------------------

<u> / </u>	\$ <u> / </u>	\$ <u> / </u>
----------------------	-------------------------	-------------------------

<u> / </u>	\$ <u> / </u>	\$ <u> / </u>
----------------------	-------------------------	-------------------------

27 9. Do you have any other debts? (List current obligations, indicating amounts and to whom
 28 they are payable. Do not include account numbers.)

1 _____ N/A
2 _____

3 10. Does the complaint which you are seeking to file raise claims that have been presented in
4 other lawsuits? Yes No X

5 Please list the case name(s) and number(s) of the prior lawsuit(s), and the name of the court in which
6 they were filed.

7 _____ N/A
8 _____

9 I consent to prison officials withdrawing from my trust account and paying to the court the
10 initial partial filing fee and all installment payments required by the court.

11 I declare under the penalty of perjury that the foregoing is true and correct and understand
12 that a false statement herein may result in the dismissal of my claims.

13

14

7/28/08

15

DATE

SIGNATURE OF APPLICANT

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ORIGINAL

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name Stone Elnorris
(Last) (First) (Initial)

Prisoner Number V-67067
Institutional Address P.O. Box 950, Represa CA. 95671

=====

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Elnorris Stone Case No. CV 07 6263 TEH (PR)
Full Name of Petitioner (To be provided by the clerk of
court)

vs.
M.C. KRAMER, WARDEN PETITION FOR A WRIT OF HABEAS CORPUS
Name of Respondent (Warden or jailor)

=====

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainers), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

(a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

Alameda County Superior Court Alameda County
Court Location

(b) Case number, if known 145534-B

(c) Date and terms of sentence 1-27-05 26 years to life

(d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes X No _____

Where? Folsom State Prison, P.O.Box 950, Represa CA. 95671
(Name of Institution) (Address)

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

Murder & Firearm Use (Penal Code Sections 187 & 12022(a)(1)).

3. Did you have any of the following?

Arraignment: Yes X No _____ Preliminary Hearing: Yes X No _____

Motion to Suppress: Yes No X

4. How did you plead?

Guilty _____ Not Guilty Nolo Contendere _____

Any other plea (specify) _____

5. If you went to trial, what kind of trial did you have?

Jury Judge alone _____ Judge alone on a transcript _____

6. Did you testify at your trial? Yes No _____

7. Did you have an attorney at the following proceedings:

- (a) Arraignment Yes No _____
- (b) Preliminary hearing Yes No _____
- (c) Time of plea Yes No _____
- (d) Trial Yes No _____
- (e) Sentencing Yes No _____
- (f) Appeal Yes No _____
- (g) Other post-conviction proceeding Yes No _____

8. Did you appeal your conviction? Yes No _____

9. (a) If you did, to what court(s) did you appeal?

Court of Appeal	Yes <input checked="" type="checkbox"/> No _____	Affirmance	2006
Supreme Court of California	Yes <input checked="" type="checkbox"/> No _____	(Year)	(Result)
Any other court	Yes <input checked="" type="checkbox"/> No _____	2006	Denial

(b) If you appealed, were the grounds the same as those that you are raising in this petition? Yes No _____ Some were.

(c) Was there an opinion? Yes No _____

(d) Did you seek permission to file a late appeal under Rule 31(a)? Yes _____ No

If you did, give the name of the court and the result:

9. Other than appeals, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes No _____

Note: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28 U.S.C. § 2244(b).

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

I. Name of Court Alameda County Superior Court

Type of Proceeding Habeas Corpus

Grounds raised (Be brief but specific):

a. Same as those raised in this petition.

b. _____

c. _____

d. _____

Result Denial Date of Result 9-25-07

II. Name of Court California Court of Appeal - First District

Type of Proceeding Habeas Corpus

Grounds raised (Be brief but specific):

a. Same as those raised in this petition.

b. _____

c. _____

d. _____

Result Denial Date of Result 12-13-07

III. Name of Court Supreme Court of California

Type of Proceeding Habeas Corpus

Grounds raised (Be brief but specific):

a. Same as those raised in this Petition.

b. _____
c. _____
d. _____

Result Denial Date of Result 7/16/08

(b) Is any petition, appeal or other post-conviction proceeding now pending in any court? Yes No **x**

(Name and location of court)

B. GROUNDS FOR RELIEF

State briefly every reason that you believe you are being confined unlawfully. Give facts to support each claim. For example, what legal right or privilege were you denied? What happened? Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you need more space. Answer the same questions for each claim.

Note: You must present ALL your claims in your first federal habeas petition. Subsequent petitions may be dismissed without review on the merits. 28 U.S.C. § 2244(b); McCleskey v. Zant, 499 U.S. 467; 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).

Claim One: See attached pages.

Supporting Facts: _____

Claim Two: See attached pages.

Supporting Facts: _____

Claim Three: See attached pages.

Supporting Facts: _____

If any of these grounds was not previously presented to any other court, state briefly which grounds were not presented and why:

List, by name and citation only, any cases that you think are close factually to yours so that they are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning of these cases:

See attached memorandum of law.

Do you have an attorney for this petition? Yes No X
If you do, give the name and address of your attorney:

WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

Executed on 7/29/08
Date

Elan L

Signature of Petitioner

GROUND-ONE

PETITIONER'S FEDERAL CONSTITUTIONAL RIGHT TO EFFECTIVE COUNSEL WAS VIOLATED(see attached memorandum of law (amol) at 19-28).

Petitioner testified he committed the instant killing in self-defense. The decedent, Gardiner, tried to shoot Petitioner and Yarborough(RT-414-28). Defense Counsel failed to call Yarborough, who was willing to testify and corroborate Petitioner that Gardiner did try to shoot them, forcing them to kill Gardiner instead. Yarborough informed Counsel of his willingness to testify as such(attached exhibit (att.ex.) Q). Counsel had no reasonable tactical basis for not calling Yarborough.

GROUND TWO-PETITIONER'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED(SEE amol at 29-36).

The defense depended upon proof Gardiner was violent, dangerous and had attempted to shoot Petitioner. While investigating this case, detectives learned Gardiner had admitted committing two shootings: one at 96th and Bancroft and one involving a victim named "Leo"(CT-594-95). Defense Counsel requested disclosure of any information related to the shootings(PTRT[prior trial reporter's transcript]-104,109-11,34,150-52). The prosecution failed to (1) disclose information on the Bancroft shooting until after Petitioner was convicted and when confronted with a news article about the shooting (RT-750,754-55), and (2) disclose information on another area shooting which detectives on this case had investigated and should have remembered(RT-753-54; att.ex. I-1-7). Evidence strongly indicated Gardiner was a Bancroft shooter, including his resume at the crime scene(att.ex. C-1-2). The information about Gardiner shooting Leo proved true(att.ex. J; RT-615-22,624[police report and testimony regarding Gardiner's shooting of Leo Logwood]). It is reasonably probable use of the evidence at trial would have led to acquittal.

GROUND THREE-PETITIONER'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED(SEE amol at 37-39).

The failure to disclose the Bancroft and Logwood shooting information violated Petitioner's "Brady" rights at the preliminary hearing. The defense received the Logwood information after Petitioner was held to answer (PTRT-103-06, 135-36). Investigators had information Gardiner had admitted shooting a "Leo" on "51st Avenue" (CT-594-95). As it turns out, investigators had worked the Logwood case, which occurred at 5040 International Boulevard, just four days before the instant shooting (att.ex. J-1, 4, 6). The investigators either did or should have realized the Logwood shooting was the one referred to. Moreover, a simple computer check would have turned up the unsolved area shooting involving a "Leo." Investigators knew this case possibly involved self-defense (see RT-339, 341-42) and thus knew the potential importance of Gardiner having shot someone. There is a reasonable probability the shootings would have precluded a probable cause finding of murder (see RT-624 [evidence proving gun Gardiner used in this case was used by Gardiner to shoot Logwood]).

GROUND FOUR-PETITIONER'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED (see amol at 40-42).

The prosecutor never revealed the full extent of the investigation in the Bancroft shooting or all the evidence implicating Gardiner. That information was suppressed or destroyed. Circumstances suggest further investigation would have been done to identify the Bancroft shooter. It is unlikely police ceased investigation so quickly (two days according to the prosecutor in this case-RT-756) before identifying the man who'd shot Mike Hall and likely precipitated the shooting of two women (RT-756-58; att.ex. B-1-3). It is likely police (1) investigated Gardiner, whose resume was found in the car from which shots were fired (att.ex. C-1-2); (2) attempted to or did locate and question Jasmine Robbins who was present and fled with the shooter after the incident (att.ex. G-5-6; att.ex. B-1); (3) attempted to or did identify the car's owner (likely the shooter or Robbins). The car was impounded (att.ex. C-1 & H-1); or (4) showed Gardiner's photo to witnesses.

The prosecutor in this case indicated the shell casings and bullet fragment evidence and resume collected (att.ex. F-1-2; G-5) were

- lost or destroyed(RT-766,756-57; att.ex. G-8). This, too, was done in bad faith. Ballistics tests could have connected Gardiner's gun to that evidence.

In the alternative, after being apprised of the relevance of the Bancroft case to this case, investigators failed, in negligence or bad faith, to investigate, locate, and preserve information and evidence implicating Gardiner. Particularly in light of Gardiner's admission and resume, investigators should have taken the above-mentioned steps to determine if Gardiner had committed the Bancroft shooting.

GROUND FIVE-PETITIONER'S FEDERAL CONSTITUTIONAL RIGHT TO EFFECTIVE COUNSEL WAS VIOLATED(see amol at 43-47).

Counsel failed to conduct a sufficient independent investigation to locate Bancroft shooting witnesses he knew might aid the defense. Counsel knew that Gardiner had admitted to shooting someone at Bancroft and that the shooting got media coverage(CT-594-95). Counsel failed to locate a newspaper article on the shooting until after Petitioner was convicted(RT-750; CT-959). Earlier discovery of the article would have dislodged the police report from the prosecutor earlier. The reports identified victims and witnesses(att.exs. B-1-3,D,E,G). Even without the reports, Counsel could have, but failed to, locate those witnesses involved or neighborhood witnesses who could identify those involved. Evidence demonstrated many people were aware of the shooting(CT-594-95). Counsel failed to contact media outlets to determine if any witnesses or involved parties had been interviewed or identified. Counsel did not utilize information provided by Petitioner to locate Bancroft victim Mike Hall! Petitioner informed Counsel that a victim's name was "Mike," that he was from Oakland on Seminary Avenue and was on probation(see RT-718,743). Indeed, a check at the local probation office would have revealed Hall's probation was violated because of the Bancroft incident(RT-756-57).

GROUND SIX-PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND COMPULSORY PROCESS AND EFFECTIVE COUNSEL WERE VIOLATED(see amol

at 48-49).

The Trial Court received Gardiner's prison file(PTRT-114) and a report of his "physical altercation" with another prisoner(id at 115). The Trial Court denied Counsel's request for information to contact the prisoner(PTRT-115-17). The Trial Court relied solely on Gardiner's self-serving statement at the time that he was not the aggressor in that incident(id at 118). If located, the prisoner could have established Gardiner was the aggressor and thus had a pattern of violent behavior. The Trial Court hampered Counsel's ability to investigate potentially exculpatory information.

GROUND SEVEN-PETITIONER'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED(see amol at 50-51).

The prosecution suppressed a police diagram indicating police found Gardiner's gun near his body. Instead, testimony,photographs and a latter drawn diagram(att.ex. 0) were presented to prove the gun was found feet away from Gardiner(RT-89-98,114-17;331-32). However, reports and testimony indicate the gun and Gardiner were in "very close proximity"(RT-330; att.ex. P-1). Also, the position of the gun suggests it was placed further away before being photographed rather than dropped there by Gardiner(RT-230-31). The gun position was relevant to whether Gardiner was armed when killed. The prosecutor argued Gardiner's alleged distance from the gun proved he was not(RT-599-600,653,657,693,697-98).

GROUND EIGHT-PETITIONER'S FEDERAL CONSTITUTIONAL RIGHT TO EFFECTIVE COUNSEL WAS VIOLATED BY INADEQUATE CROSS-EXAMINATION AND IMPEACHMENT(see amol at 52-57).

Juan Rodriguez's was the only testimony to contradict Petitioner's. The prosecutor relied on it to argue Petitioner came back and fired a shot at an already disabled Gardiner(RT-180,196-97,655). Counsel failed to show through questioning that Rodriguez's inconsistent statements were not innocent but rather proved he had not seen the shooting but was lying to placate the prosecutor and pro-

- tect his family. Rodriguez was fearful and tried to prevent police from talking to his daughter(RT-535; PTRT-511,549; RT-187,172-73). However, he had indicated his wife and/or child, rather than he, had seen the shooting(RT-550,527,533,189). Counsel failed to ask Rodriguez why he identified Yarborough at the preliminary hearing as the shooter(RT-204) but at trial fingered the man identified as Petitioner. Counsel failed to elicit (1) that Yarborough was a defendant at the preliminary hearing and (2) that prosecution evidence at the time indicated Yarborough was the only shooter(CT-160-69,204,195-96,222-26). Such would have suggested Rodriguez was tailoring his testimony to prosecutor evidence.
- Counsel did not elicit that Rodriguez had little or no difficulty understanding questions at the preliminary hearing and identified Yarborough several times(CT-18-141; CT-29,20-21,34-35,68-69,79,84-85). Such would have rebutted prosecution suggestion Rodriguez's flip-flop resulted from a language barrier(RT-204-05).
- Counsel failed (1) to ask Rodriguez why he did not give the "walk away, come back" testimony when questioned previously; (2) to impeach Rodriguez with his prior testimony there was no walking away and coming back; (3) to elicit that the prosecutor blatantly led Rodriguez into giving the "walking away, coming back" testimony(PT RT-497); (4) to impeach Rodriguez with his prior inconsistent statement he had not seen a muzzle flash from the gun(compare RT-180 with CT-113,34-36,41-42,18-26,33-36,86-91); (5) to impeach Rodriguez with his prior "identification" of Petitioner at the preliminary hearing(CT-20-21; compare RT-192[Rodriguez testifying at trial he could not identify Petitioner]); (6) to impeach Rodriguez with his prior testimony he saw a body or "shadow" falling(PTRT-527-28,491; compare RT-174-75[Rodriguez testifying at current trial he did not see a third person and thought the gunman was shooting a tire]; see amol at 52-56A).

GROUND NINE-PETITIONER'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED BY THE USE OF PERJURED TESTIMONY(see amol at 58-64).

Substantial evidence demonstrated Rodriguez's testimony was perjured,

that he did not see the shooting, and that his testimony was intended to appease the prosecutor so his family would not be called to testify. That evidence included (1) his own admission he did not see the shooting(RT-189); (2) his inability to identify Petitioner and Yarborough in photo lineups(RT-204; CT-131-32) and his identification of someone who was not involved(RT-201-02); (3) Rodriguez's wildly inconsistent and otherwise unexplainable reversals about what he allegedly saw(as set out in Ground eight; see amol at 52-56A); and (4) physical evidence and expert testimony demonstrating none of Gardiner's wounds could have been inflicted in the way Rodriguez testified(RT-88,179,196-97[Rodriguez testimony]; RT-315-17,322,70-72 [expert testimony]). Finally, there was the nature and timing of Rodriguez's reversals, which always conformed to the prosecutor's shifting proof needs(see attached memorandum at 52-56A).

GROUND TEN-PETITIONER'S FEDERAL CONSTITUTIONAL DUE PROCESS RIGHTS WERE VIOLATED BY HIS CONVICTION BASED ON INSUFFICIENT EVIDENCE(see amol at 65-76).

There was insufficient evidence (1) to disprove self-defense or (2) prove premeditation and deliberation(see amol at 73). Petitioner's testimony that he and Yarborough shot an armed, violent and threatening Gardiner in order to protect themselves established self-defense as a matter of law(RT-415-30). Lakeisha Jackson's eyewitness testimony corroborated Petitioner's testimony that he and Gardiner struggled over Gardiner's gun before the shooting(RT-424-27[Petitioner's testimony]; RT-248,252,341[Jackson's testimony]) and that Yarborough's shooting failed to stop the fight(RT-426-27, 430[Petitioner's testimony]; RT-216-17,221,246,248[Jackson's testimony]). Physical evidence demonstrated two guns were fired at Gardiner from "all different directions"(RT-76,68-69,291,313), a fact consistent with Gardiner being shot during a struggle(RT-560). Powder burn evidence corroborated Petitioner as to which wounds he inflicted up close and which Yarborough inflicted from a distance (RT-424,428-36[Petitioner's testimony]; RT-70-72,80[Coroner's expert testimony]; att.ex. A-7-B[Coroner's report]).

Autopsy, shell casing and other physical evidence corroborated,

• rather than disproved, Petitioner's testimony Gardiner was up and struggling rather than down and disabled when the bullet wounds were inflicted(see amol at 71,73-75). Expert testimony confirmed Gardiner could have continued to be a threat and attempted to shoot Petitioner after having been shot(RT-555-56,575,79-81; see amol at 68). Evidence was consistent with Petitioner's testimony Gardiner either had his gun or Petitioner reasonably believed he did, when Petitioner was forced to finally kill him(RT-508,512,830). Evidence was insufficient to disprove Petitioner actually believed it was necessary to kill in self-defense either reasonably or unreasonably. Evidence showed Gardiner was dangerous, violent, and thus likely to have attempted to shoot Petitioner and Yarborough. He angrily intended to confront the men while armed with a fully loaded nine millimeter weapon(RT-110-11,119-20,155-59;140-42) Gardiner had used to shoot Leo Logwood just four days before(RT-157,539;618-19,624). Evidence demonstrated the reasons motivating Gardiner's violent conduct in this case also motivated him to shoot Logwood(RT-616, 417-19). There was no evidence Petitioner was motivated by anything other than self-defense to shoot Gardiner(see amol at 72).

GROUND ELEVEN-PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS TO JURY TRIAL, DUE PROCESS AND EFFECTIVE COUNSEL WERE VIOLATED(see amol at 77-82).

Absence of self-defense is an element of murder(CALJIC no. 5.15). The jury was instructed that self-defense is not available to one who initiates an assault unless he tries to stop fighting and informs his opponent he wants to, and has, stopped fighting(CT-876; CALJIC no. 5.54). The Trial Court failed to instruct that an aggressor need not withdraw and may defend himself if his opponent's response is unreasonable and excessive and allows no opportunity to withdraw(see amol at 77-78). Counsel failed to request such instruction. There was evidence Petitioner, suspecting Gardiner was threatening Yarborough, spun Gardiner around (i.e. simple assault) after which Gardiner unreasonably tried to shoot Petitioner. Petitioner had no opportunity to withdraw and Gardiner was subsequently shot(RT-422-29,493). Given the instructional omission,

the jury might have concluded Petitioner lost the right to defend by grabbing Gardiner and failing to withdraw(see amol at 79 :).

GROUND TWELVE-PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS TO JURY TRIAL, DUE PROCESS AND EFFECTIVE COUNSEL WERE VIOLATED(see amol at 83-84).

The instructional omission addressed in Ground eleven may have foreclosed an unreasonable self-defense manslaughter verdict as well. The jury was instructed that such a verdict is denied one who "created the circumstances which legally justified" his adversary's attack(CT-868; CALJIC no. 5.17). 5.17 incorporates the rule an adversary's unreasonable response restores the initial aggressor's right to self-defense(see amol at 77-78). The error could have led the jury to conclude Petitioner's inability to withdraw foreclosed a manslaughter verdict(id at 83-84).

GROUND THIRTEEN-PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND JURY TRIAL WERE VIOLATED. COUNSEL WAS INEFFECTIVE IN VIOLATION OF THE SIXTH AMENDMENT(see attached mol at 85-88).

The instructional omission in Ground eleven infected the mutual combat instructions. The jury was instructed a mutual combatant is denied the right of self-defense unless he tried to stop fighting, informed his opponent he has done so, and gave his opponent and opportunity to do so(CT-879; CALJIC no. 5.56). For the above reasons(Grounds 11 & 12), the error and the evidence of an extended struggle and failure to withdraw may have unjustifiably foreclosed a self-defense acquittal(see amol at 79). Trial Counsel failed to request the proper instruction.

GROUND FOURTEEN-PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS TO JURY TRIAL, DUE PROCESS AND COMPULSORY PROCESS WERE VIOLATED(see amol at 89-93).

The Trial Court denied Petitioner's request for an instruction allowing the jury to rely on evidence of the decedent's prior violent

acts to prove he attacked Petitioner in this case(RT-626; CT-795 [text of rejected instruction]). The other self-defense instructions did not address the issue(CT-863-78). The instruction was required by state law and its omission lowered the prosecution's burden of proof.

GROUND FIFTEEN-THE SIXTH AMENDMENT WAS VIOLATED WHEN PETITIONER WAS CONSTRUCTIVELY DENIED COUNSEL AND HIS ATTORNEY HAD AN ACTUAL CONFLICT OF INTEREST(see amol 94-101).

Trial Counsel Pyle had a conflict of interest at Petitioner's "Marsden" hearing and during post-trial proceedings. Petitioner sought (1) to have Counsel removed for his deficient performance and (2) to have new counsel appointed to file a motion for new trial based on Pyle's ineffectiveness(RT-709,709-49). Among other failings, Pyle (1) failed to interview Movita Patterson, an exculpatory witness(RT-730-31,734-35); (2) failed to obtain an exculpatory police diagram(RT-721,719,724); (3) failed to locate and call Bancroft shooting witnesses(RT-743[Ground five]; see att.ex. T); (4) failed to call Romeo Yarborough to testify(see Ground one); (5) failed to timely authorize defense investigation(RT-710-11).

To prevent his removal and to avoid providing proof of his ineffectiveness, Pyle feigned loss of memory to conceal his ineffectiveness (RT-719-21,715-18,720,729-31). Pyle otherwise mislead the Court on the matter. As a result, the "Marsden" motion was denied(RT-749). Due to his conflict, Counsel also failed to raise claims of ineffectiveness or to locate witnesses for the new trial motion. Petitioner was forced to represent himself at the "Marsden" hearing.

GROUND SIXTEEN-PETITIONER'S FEDERAL CONSTITUTIONAL RIGHT TO EFFECTIVE APPELLATE COUNSEL WAS VIOLATED(see amol at 102-105).

Appellate Counsel failed to raise the claims in this petition on direct appeal. There was no reasonable basis for the failure to do so.

GROUND SEVENTEEN-PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS TO EFFECTIVE COUNSEL, DUE PROCESS, AND COMPULSORY PROCESS WERE VIOLATED.

Counsel failed (1) to move for a continuance until after Romeo Yarborough was sentenced (see ground one); (2) to assure that Yarborough would testify for the defense after he was sentenced; (3) to seek charging and sentencing immunity related to the fact and content of Yarborough's testimony. The above actions would have removed the below obstacles to Yarborough testifying for the defense.

Compulsory and Due Process were violated when (1) the prosecutor and/or Yarborough's attorney (a state-employed public defender PTRT-page 1) requested, and the trial court granted, continuances for over a year to delay Yarborough's sentencing until after Petitioner's trial(CT-688,1012); (2) the attorney advised Yarborough not to testify before being sentenced and that his testimony might affect his sentencing; and (3) the prosecutor told Yarborough and/or his attorney that testifying would or might affect Yarborough's sentence. The foregoing was intended to intimidate, and actually intimidated, Yarborough into not testifying for the defense.

GROUND EIGHTEEN-PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, IMPARTIAL JURY, JURY TRIAL, EQUAL PROTECTION, AND EFFECTIVE COUNSEL WERE VIOLATED.

Petitioner's rights were violated by the presence of biased jurors on the panel. Trial Counsel failed to challenge bias jurors and to adequately question jurors to uncover bias. The prosecutor used peremptory challenges to exclude black and minority jurors. Trial Counsel failed to object on the basis of "Batson-v-Kentucky." Appellate Counsel failed (1) to challenge the juror panel as biased or to raise the prosecutor's "Batson" violations, or (2) to order preparation of the voir dire transcript and juror questionnaires to investigate possible bias and "Batson" claims.

GROUND NINETEEN-PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE

PROCESS AND EQUAL PROTECTION WERE VIOLATED.

Petitioner filed with the Alameda County Superior Court a habeas petition alleging errors in jury selection and an accompanying motion for preparation and provision of the transcript of the jury voir dire and the completed jury questionnaires. The transcripts and questionnaires were needed by Petitioner to prove his claims in the habeas petition. The Superior Court denied the motion and the petition.(see attached exhibit V)

GROUND TWENTY-PETITIONER'S FEDERAL CONSTITUTIONAL RIGHT TO EFFECTIVE COUNSEL WAS VIOLATED.

Prosecution witness Rodriguez testified he heard several shots then saw Petitioner walk away from a disabled Gardiner, walk back, and fire one last shot near Gardiner(RT-173,180,196-97). This was the sole evidence contradicting Petitioner's self-defense testimony. The prosecutor relied on it to argue premeditation and deliberation (RT-655). Defense Counsel failed to interview and call to testify Felix Segura to contradict Rodriguez. Segura would have testified he heard two guns (one louder than the other) being fired on the night of the shooting. The shots were in such rapid succession as to preclude anyone from having fired, walked away, come back and fired again. Segura did not see anyone running away. He came out of his house afterwards and saw Gardiner's body. Segura's testimony would have corroborated Petitioner's testimony the last shots were fired in rapid succession in self-defense(RT-424,428,436).

(See Declaration of Felix Segura attached hereto as Exhibit W)

EXHIBIT-W

DECLARATION OF FELIX SEGURA

I, Felix Segura, hereby declare as follows:

1. On December 5, 2002, I witnessed certain occurrences relating to the shooting of Noble Gardiner. That shooting occurred on the street outside my house.
2. On that night, while in my home, I heard shots being fired outside. It sounded like two guns were being fired, one louder than the other. The shots were fired in rapid succession and without any substantial pause between them. No one could have shot, walked away, come back and shot again.
3. When I looked out my window after the shooting, I saw someone running away. I was unable to tell who the runners were or what their race was. I also saw a black woman come out of a house, get in a car and drive away.
4. After the shooting, I saw that a person was laying on the sidewalk. I went outside and saw he was bleeding, which prompted me to call 911. I spoke to an officer that night at the scene.
5. Some days later, I was interviewed by Oakland Police Sergeant Longmire. I told him about the two people who walked by my house 2-3 days after the shooting.
6. I was also interviewed by a man and a woman who I believed

were working with the defense. I told them I did not see who fired the guns.

7. If it is necessary, I am willing to testify as to the contents of this declaration and on any other relevant matters.

I, Felix Segura, swear under penalty of perjury that the foregoing is true and correct. Executed this 4, day of

2, 2008 at 1555 52 ave oakland ca 94601
(month) (address)

Felix Segura

Declarant

PROOF OF SERVICE BY MAIL

I Elnorris Stone, AM A RESIDENT OF FOLSOM STATE PRISON IN THE COUNTY OF SACRAMENTO, STATE OF CALIFORNIA. I AM OVER THE AGE OF 18 YEARS, AND I AM /AM NOT A PARTY TO THIS ACTION.

MY PRISON NUMBER IS: V67067

MY PRISON ADDRESS IS; P.O. BOX 950, Folsom, Ca. 95763

ON July 29th, 2008, I SERVED A COPY OF THE FOLLOWING DOCUMENT: Habeas Corpus with attached Memorandum of points and authorities in support of Petition for Habeas Corpus, Prisoner's Application to proceed In Forma Pauperis, Notice of Motion & Motion for Directed NUNC PRO TUNC And Proposed Order.

ON THE FOLLOWING PARTIES BY PLACING THE DOCUMENTS IN A SEALED ENVELOPE WITH POSTAGE FULLY PAID, IN THE UNITED STATES MAIL, IN A DEPOSIT BOX SO PROVIDED AT FOLSOM STATE PRISON (MAILBOX RULE), FOLSOM, CALIFORNIA, ADDRESSED AS FOLLOWS:

U.S. District Court
Northern District of California
450 Golden Gate Ave.
San Francisco, California 94102

Attorney General
Jerry Brown
1300 I St. Suite 125
Sacramento, CA. 95814

THERE IS DELIVERY SERVICE BY THE UNITED STATES MAIL AT THE PLACE SO ADDRESSED, AND/OR THERE IS REGULAR COMMUNICATION BY MAIL BETWEEN THE PLACE OF MAILING AND THE PLACE SO ADDRESSED.

I DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED July 29th, 2008, AT FOLSOM, CALIFORNIA..


<signature here>

ORIGINAL

ELNORRIS STONE
#V67067
FOLSOM STATE PRISON
P.O.BOX 950
FOLSOM, CA. 95763

7/29/08

COURT CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
450 GOLDEN GATE AVE.
SAN FRANCISCO, CA 94102

RE: Case # CV 07 6263 TEH (PR)

Dear Court Clerk,

May God bless you.

Please notice & find enclosed the following documents:

Original copy of Petition for Habeas Corpus, Proof of service, Attached Memorandum of Points and Authorities in support of Petition for Habeas Corpus, Proof of service, Application to proceed In Forma Pauperis, Notice of Motion & Motion for Directed Nunc Pro Tunc, Proposed Order & Declaration.

I am asking the following:

- ° The date of the original Petition -filed Dec. 6, 2007- reflect on this new filing.
- ° Please give me a conformed copy of the above mentioned documents.
- ° Please give me leave to complete my In Forma Pauperis affidavit, being that timeliness is at issue & I have requested a new certification from prison authorities (see enclosed request accompanying IFP).
- ° Let my letter be construed as my consent for a magistrate Judge in this issue.

~ Thank you for your time and attention in this matter.

Sincerely in Christ,



Elnorris Stone

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PROOF OF SERVICE BY MAIL

I Elnorris Stone, AM A RESIDENT OF FOLSOM STATE PRISON IN THE COUNTY OF SACRAMENTO, STATE OF CALIFORNIA. I AM OVER THE AGE OF 18 YEARS, AND I AM A NOT A PARTY TO THIS ACTION.

MY PRISON NUMBER IS: V67067

MY PRISON ADDRESS IS; P.O. BOX 950, Folsom, Ca. 95763

ON July 29, 2008, I SERVED A COPY OF THE FOLLOWING DOCUMENT: Notice of Motion & Motion for Directed NUNC PRO TUNC, Denial of Habeas Corpus in The CA. Supreme Court, & Proposed Order for Directed NUN PRO TUNC.

ON THE FOLLOWING PARTIES BY PLACING THE DOCUMENTS IN A SEALED ENVELOPE WITH POSTAGE FULLY PAID, IN THE UNITED STATES MAIL, IN A DEPOSIT BOX SO PROVIDED AT FOLSOM STATE PRISON (MAILBOX RULE), FOLSOM, CALIFORNIA, ADDRESSED AS FOLLOWS:

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I DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED July 29, 2008, AT FOLSOM, CALIFORNIA..



<signature here >